UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

REUBEN G. LENSKE, Appellant,	)	
v.	)	No. 20448
UNITED STATES OF AMERICA, Appellee.	)	

BRIEF OF NATIONAL LAWYERS GUILD AS AMICUS CURIAE

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Of Counsel

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

Rules

Textbooks and Other Authorities

The Trial Court Deprived Appellant of Constitutional Rights in Proceedings Upon Motion for New Trial

Following his conviction, appellant Reuben G. Lenske moved for a new trial on the ground of newly discovered evidence, pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The appellant had initially been convicted for violations of the income tax law, a conviction which had been obtained by the Government by use of the net worth procedure. The validity of the net worth procedure depended, of course, upon the presentation of competent evidence of the amount and value of the assets of appellant at both the beginning and end of the accounting period. This in turn depended upon the reliability of the testimony of the government agents and appraiser offered by the Government in support of its case. The net worth method was approved by the Supreme Court in Holland v. United States, 348 U.S. 121, 75 S. Ct. 127, 99 L. Ed. 150 (1954), but the opinion enjoins caution in making use of it.

In moving for a new trial, the appellant produced supporting affidavits and other data which, if accepted by the trial court, might well have established that the prosecution witnesses had lawlessly acted in obtaining the private papers of appellant, had been patently biased and prejudiced against appellant and had erroneously and without basis caused the conviction of appellant by an improvised net worth method which the prosecution witnesses knew was without basis in fact.

The Government of course opposed the motion of appellant and

by its opposing papers endeavored to show the trial court that appellant's motion for a new trial was without support either in law or in fact.

In deciding the issues thus presented, the trial court appears to have unduly restricted some of the legal and constitutional rights of appellant. For example, during the hearing the Government, in opposition to appellant's arguments, proceeded to offer to the Court the depositions of certain government agents which appellant had taken in a prior civil suit instituted by appellant and which to some extent involved different and separate issues than those which were involved on the motion for a new trial. Although some of the government agents were present in Court at the time these depositions were accepted by the trial judge on the motion for new trial, the trial judge refused to permit these government agents to be called by appellant and be cross-examined by him. One government agent had executed an affidavit which the Government used in opposition to the motion for a new trial made by appellant. Although this government agent was in the courtroom, the trial judge refused the appellant the right to cross-examine such government agent. The appraiser witness was also in the courtroom. The appellant sought to call him as a witness, but, upon the opposition of the Government, the trial court refused to allow said witness to testify. Although the appellant was not permitted to call these witnesses and cross-examine them, despite the fact that depositions and affidavits were being used against him, the Government nevertheless relied on those depositions

impossibility of producing the affected witness live. That indeed is fundamental to and a part of the appellant's right to confront and cross-examine witnesses in criminal proceedings.

". . . As the Court said in Mattox v. United States,

" 'The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand the manner in which he gives his testimony whether he is worthy of belief.' 156 U.S. 237, 242-243, 15 S. Ct. 337, 339, 39 L. Ed. 409 [1895].

"See also 5 Wigmore, Evidence §§ 1365, 1397 (3d ed. 1940); State v. Hester, 137 S.C. 145, 189, 134 S.E. 885, 900 (1926)."

Douglas v. Alabama, 380 U.S. 415, 418-419, 85 S. Ct. 1074, 1076-1077 (1965).

It should be noted that in the proceedings herein, cross-examination was denied even though live witnesses were present. If appellant had examined some of these witnesses in a prior civil proceeding and taken their depositions, that is no reason, it is submitted, for denying appellant the opportunity to cross-examine the government witnesses who were present during the criminal proceedings on the motion for new trial. The issues involved in the civil action brought by appellant

against government agents were different from those facing the criminal court in the action herein, especially on the motion for a new trial. In addition, it appears clear that the depositions taken in the civil proceedings were taken under circumstances in which the witnesses were hostile and the appellant unable to elicit the testimony to which he was entitled. On the other hand, before the District Court these witnesses could have been fully cross-examined by appellant and the Court enabled to look upon the witnesses and determine from their answers and from their manner and answering whether or not they had been or were worthy of credence and whether or not their testimony was competent to support the judgment of conviction which had been rendered against appellant. Appellant was denied the opportunity to make such demonstration by cross-examination, while the Government argued at length the truth of its position based upon the depositions of witnesses who were present in the courtroom but whom the District Court refused to call to the stand.

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might

be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots . . . ."

Green v. McElroy, 360 U.S. 474, 79 S. Ct. 1400, 1413, 3 L. Ed. 2d 1377 (1959).

Appellant had been convicted of a serious offense, and the judgment of conviction will undoubtedly substantially affect his liberty and livelihood. The motion for a new trial upon the ground of newly discovered evidence under the Federal Rules of Criminal Procedure is a guaranty to an accused that the federal courts are always open to right a miscarriage of justice. A judge, it is respectfully submitted, vested with statutory authority to grant or deny a motion for a new trial, should conduct such proceedings with the most scrupulous regard for the rights of the accused. The exercise of judicial discretion should be exercised under circumstances which will satisfy justice and the appearance of justice. Due process of law includes at least the idea that a person accused of a crime shall be accorded a fair hearing through all the stages of the proceedings against him. The high commands of due process are not obeyed, it is submitted, if important witnesses present in the courtroom are not permitted to be subjected to cross-examination while their depositions and ex parte affidavits are accepted as evidence against the claims of the accused.

"It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a

criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. See, e.g., 5 Wigmore, Evidence § 1367 (3d ed. 1940). The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution. Moreover, the decisions of this Court and other courts throughout the years have constantly emphasized the necessity for cross-examination as a protection for defendants in criminal cases. This Court in Kirby v. United States, 174 U.S. 47, 55, 56, 19 S.Ct. 574, 577, 43 L.Ed. 890, referred to the right of confrontation as '[o]ne of the fundamental guaranties of life and liberty,' and 'a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the constitution of the United States and in the constitutions of most, if not of all, the states composing the Union.' Mr. Justice Stone, writing for the Court in Alford v. United States, 282 U.S. 687, 692, 51 S.Ct. 218, 219, 75 L.Ed. 624, declared that the right of cross-examination is 'one of the safeguards essential to a fair trial.'

. . . .

"There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their

expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law. In In re Oliver, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682, this Court said:

> "'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense--a right to his day in court--are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.' 333 U.S., at 273, 68 S. Ct., at 507 (footnote omitted).

"And earlier in this Term in Turner v. State of Louisiana, 379 U.S. 466, 472-473, 85 S. Ct. 546, 550, 13 L. Ed. 2d 424, we held:

> "'In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the "evidence developed" against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right to confrontation, of cross-examination, and of counsel.'

"Compare Willner v. Committee on Character & Fitness, 373

"[T]he privilege of confrontation, . . . '. . . was intended to prevent the conviction of the accused upon depositions or ex parte affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination.'"

Snyder v. Massachusetts, 291 U.S. 97, 106-107, 54 S. Ct. 330, 332-333, 78 L. Ed. 2d 674 (1934).

This basic concept is pervasive in the decisions of the courts. United States v. Coplon, 185 F. 2d 629, 637-638 (2d Cir. 1950); Wilson v. Gray, 345 F. 2d 282, 286 (9th Cir. 1965); Barton v. United States, 263 F. 2d 894, 897-898 (5th Cir. 1959); United States v. Douglas, 155 F. 2d 894 (7th Cir. 1946).

Conclusion

It is respectfully submitted that the order of the United States District Court for the District of Oregon denying appellant's motion for a new trial should be reversed.

Dated, February 28, 1966, at San Francisco, California.

Benjamin Dreyfus,
Attorney for National Lawyers Guild

Samuel Rosenwein
Nels Peterson
Norman Leonard
David Rein
Ernest Goodman

Of Counsel

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

February 23, 1966

RMR:LAJ:JMHoward:mbf
5-61-1558

AIR MAIL

Benjamin Dreyfus, Esq.
Attorney at Law
501 Fremont Building
341 Market Street
San Francisco, California 94105

Re: Reuben G. Lenske v. United States
No. 20448, Ninth Circuit Court of Appeals

Dear Mr. Dreyfus:

Reference is made to your letter of February 7, 1966 addressed to United States Attorney Lezak, in which you enclosed a copy of a proposed brief amicus curiae on behalf of appellant in the above-entitled matter. You requested that the United States Attorney consent to the filing of the brief. Since the case is being handled by the Department at Mr. Lezak's request, he promptly forwarded your letter to us.

This is to notify you that we will consent to the filing of your brief amicus curiae.

Sincerely yours

RICHARD M. ROBERTS
Acting Assistant Attorney General
Tax Division

By: Lee A. Jackson
LEE A. JACKSON
Chief, Appellate Section

cc: William B. Luck, Esq.
Clerk, U.S. Court of Appeals
P. O. Box 547
San Francisco, Calif. 94101

Sidney I. Lezak, Esq.
United States Attorney
Portland, Oregon 97207

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
City and County of San Francisco) ss.

Dorothy Wood, being first duly sworn, deposes and says:

I am a citizen of the United States, over the age of eighteen years, and not a party to or interested in the within action; my business address is 501 Fremont Building, 341 Market Street, San Francisco, California 94105.

I served the within BRIEF OF NATIONAL LAWYERS GUILD AS AMICUS CURIAE by placing three copies thereof in envelopes addressed to each of the following:

Richard M. Roberts, Esq., Acting
Assistant Attorney General, Tax Division
United States Department of Justice
Washington, D. C. 20530

Sidney I. Lezak, Esq.
United States Attorney
United States Courthouse
Portland, Oregon 97207

Reuben Lenske
1014 S. W. Second Avenue
Portland, Oregon 97204

which envelopes were then sealed and postage fully prepaid thereon, and thereafter were, on March 2, 1966, deposited in the United States mail at San Francisco, California.

Dorothy Wood

Subscribed and sworn to before me
this 2d day of March, 1966.

Zaide Kirtley
Notary Public in and for the City and
County of San Francisco, State of
California. My Comm. Exp. Jan. 7, 1967.